Harmonization and Unification of Intellectual Property in the EU

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Now that the industrialised world operates as a set of knowledge-based societies, the intellectual property rights have become foreground features of their economies. The protection of intellectual property in the EU rests on several pillars, which cover patents, trade marks, industrial designs, copyright and allied rights. Now the EU is very near to achieve its long-term goal of creating unitary IP regimes for the whole of its territory. The only exception are the patents. The EU failed to create a European Community patent. It seems that the users of the present European patent system will have to be satisfied with it, despite its many imperfections. However there is still a way out of the present cul-de-sac, using the arts. 142–149 EPC and forming a kind of a legal quilt. In this way, a Community patent would be created and the IPR system in the EU would be unified.

GENERAL

We live in interesting times (as Chinese would say). Knowledge is rendered fluid through its transference from material objects to other media; workplaces and markets are replaced by remote visualisation; data can be stored in convenient magnetic and electronic packages … The signs of new order – called the Knowledge Society – are everywhere. Participating in this new world order is a challenge for both individuals and nations, for it requires high intellectuality and advanced technological infrastructure. The shift from physical to virtual is a challenge for both international and personal relations and it will certainly provoke dramatic changes in law.

The Knowledge-Society core source of wealth is the recognition of intellectual property. Information, ideas and innovation are basic tools of the modern, knowledge-based economy. With the ready availability and increased sophistication of copying devices such tools would be valueless without the protection of intellectual property laws (Tritton 2002, 3). Generally speaking, intellectual property protects applications of ideas and information that are of commercial value (Cornish and Llewelyn

2003, 6).[1] Intellectual property confounds two different rights. One is 'the right of sale' given to producers of ideas, it consist of the right to sell the fruits of intellectual work in whatever form they can be embodied, packaged and transmitted. The second right associated with the term 'intellectual property' refers to the power of producers of ideas to control how their products are used (Boldrin and Levine 2004, 328). This ability to control provides producers of ideas with monopoly power (intellectual monopoly) as a reward for a new know-how and for new information. Monopoly is therefore granted as a legal inducement to create new works. Copyrights, trademarks, design rights and patents, to name just the most important ones, were developed to extend the time in which competitors were isolated from other market entrants. In this way they stimulate competition on the basis of legal exclusivity in free enterprise markets. The presence of strong intellectual property rights spurs innovation leading to a higher economic growth and increasing benefits for all.

As we said, the shift from physical to virtual is generating enormous changes in all fields of human activity including law. Patents are now used to protect software, business methods, and sports moves. The term of copyright has been lengthened and rights regarding digitised products strengthened. Sui generis measures have been enacted, such as semiconductor protection or genetic maps. Entrepreneurs are demanding new private rights: the expansion of existing intellectual property regimes and the adoption of new ones.

In some ways, the most important changes are those occurring in the international arena. Few other areas of laws have been subject to so much international legislation, which was enacted to ensure that works of nationals were protected internationally and that there was a mutual reciprocity of protection between states. This was achieved through international conventions and agreements, which establish and enforce worldwide harmonised intellectual property norms (The Berne Convention,[2] the Paris Convention,[3] the Trade Related Aspects of Intellectual Property Agreement – TRIPS Agreement,[4] the Patent Co-operation Treaty, the Madrid Protocol on Trademarks, and regional treaties such as the African Industrial Property Convention, the Eurasian Patent Convention, to name the most important ones).[5] The main technique for accommodating differences between laws is the principle of national treatment: each state, member to Paris, Berne and TRIPS, is obliged to grant nationals of the other members the same right as it accords to its own na-

tionals. In addition to this, the conventions strive to set minimum standards which all members must meet. The result of such an international approach is a considerable degree of harmonisation of intellectual property laws worldwide and particularly in Europe.

The obvious purpose of intellectual property is to give protection against rival enterprises that would otherwise sell goods or provide services in direct competition (Cornish and Llewelyn 2003, 41). In international trade, however, 'intellectual property goods' can be prevented from moving from one territory to another, a barrier can be set up against export or import. This was also the case in the European Community where in the past intellectual property rights played a major role in preventing the free movement of goods from one part of Common Market territory to another. In the eyes of Community authorities it has been urgent to put an end to this. Indeed this was the prime reason for harmonisation and unification of intellectual property laws (Cornish and Llewelyn 2003, 43).

THE FREE MOVEMENT OF GOODS IN THE EU

The provisions on free movement of goods are contained within Part Three of EC Treaty, which contains many of the fundamental principles that are of importance in establishing a common market. This part of the Treaty sets out, inter alia, the four freedoms, which are of central importance in realizing the goals of the Community. One of them is the free movement of goods within the Community (others are free movement of workers, freedom of establishment and to provide services, free movement of capital). The provisions on the free movement of goods are designed to ensure the elimination of duties, quotas, quantitative restrictions and other measures having equivalent effect. Since intellectual property law by its very nature tends to restrict the free movement of goods, the Court of Justice of the European Communities has held that national intellectual property rights may amount to measures having equivalent effect (Steiner and Woods 1999, 161). Prohibition or restrictions on the free movement may be allowed only if such restriction is justified on grounds of public morality, public policy, public security ... including the protection of industrial and commercial property (article 30 EC Treaty, ex article 36).[6] The conflict between a Common market and intellectual property rights has been lessened by means of harmonisation and later unification of intellectual property rights and by principles developed by ECJ (the most important are the principle of exhaustion of

rights, the existence v. exercise doctrine, the principle specific subject matter doctrine).

HARMONISATION OF INTELLECTUAL PROPERTY LAW IN EUROPE

Because of the wide disparity in national intellectual property law and the resulting adverse impact on the internal market, harmonisation at Community level was clearly required. The Commission has therefore decided to strive for harmonisation of national laws and for a stronger and more effective protection of intellectual property. As a legal basis for issuing a substantial number of harmonising directives in this field, article 95 (ex article 100a) of the EC Treaty has been used. This article permits the adoption of legislative acts 'for the approximation of the provisions laid down by law [...] in Member states which have as their object the establishment and functioning of the internal market.' Recourse to article 95 is possible if the aim is to prevent the emergence of future obstacles to trade resulting from a different development of national laws.

Attention was initially focused on trade marks. The firs instrument in the field of trade marks, Directive 89/104, was passed in 1989. Its aim was to approximate those aspects of trade-mark law, which most directly affect the functioning of the common market. The directive defines trade mark rights and provides that the conditions for obtaining a registered trade mark right are nearly the same in all member states. It also provides common grounds for refusal of registration, invalidity, and exhaustion of rights. However, the directive does not change the essential character of national trade mark law, which remains essentially territorial (case IHT).[7]

In the field of designs, rights in registered designs have been harmonised Community wide from year 1998, when the Directive 98/71 was adopted, in order to ensure the free movement of products incorporating designs and free competition within the Community. The directive only harmonised the law of registered designs. It sets requirement for registration (at the Office for Harmonisation of the Internal market) and validity. The term of protection is one or more periods of five years, with a maximum duration of 25 years.

In the field of copyright, the first directive was adopted to protect topographies of semiconductor products (Directive 87/54). To harmonize Member States' legislation regarding the protection of computer programmes in order to create legal environment that will afford a certain degree of security against unauthorised reproduction of such pro-

grammes, Directive 91/250 has been adopted. The directive imposes on Member States the obligation to protect computer programmes by copyright as literary works within the meaning of the Berne Convention. Copyright protection is granted for the life of the author and 50 years after his death. In 1993, directive 93/83 was passed, with the aim to fill the gaps in the protection of programmes broadcast across borders where satellite broadcasting or cable retransmission are involved. The satellite broadcasting of copyright works requires the authorisation of the right holder. Where a phonogram is used for satellite broadcast, an equitable remuneration is to be paid to performers or to the producers of phonograms (or both). In order to broadcast live performances, to fix (record) an unfixed performance and to reproduce such a fixation, the performer's authorisation is needed. However Member States may provide a more far-reaching protection. Harmonisation of the terms of protection of copyright and related rights was achieved with Directive 93/98 that extended the duration of copyright protection to 70 years and set the term of protection for related rights at 50 years. The law relating to rental right, lending right and certain rights related to neighbouring rights was harmonised by Directive 92/100. According to this directive, member States are to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works. Member states may derogate from the exclusive lending right only if they provide that authors obtain remuneration for such lending. Member states are also to provide an exclusive right of broadcasting for performing artists in respect of their live performances and an exclusive right to make available to the public fixations of performances, phonograms, originals and copies of films for performing artists, phonogram producers, producers of the first fixations of films and broadcasting organisations. Provisions regarding the legal protection of databases were enacted by Directive 96/9. The aim in this field was to provide harmonised copyright protection for the intellectual creation involved in the selection and arrangement of materials and sui generis protection for an investment in obtaining, verifying or presenting the contents of a database. The directive does not apply to software used in the making or operation of the database. The legal protection of services based on (or consisting of) conditional access is dealt within Directive 98/84. The objective was to guarantee across the Community an equivalent level of legal protection for services whose remuneration relies on conditional access (pay-television, pay-radio services, on-demand video and audio services, elec-

tronic publishing, on-line services available on a subscription or pay-per-view basis). In 2001, Directive 2001/84 was enacted to provide creators with an adequate and standard level of protection and to eliminate certain distortion within the single market for contemporary art. According to this directive artists have an inalienable right to receive a percentage of the sales price obtained from any resale of the work, with exceptions of transactions effected by individuals acting in their private capacity. Finally Directive 2001/29 has been adopted to adapt legislation on copyright and related rights to technological developments and to information society. The aim was also to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights, adopted within the framework of WIPO in December 1996 (The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)).[8] The directive deals with three main areas: reproduction rights, the right of communication and distribution rights. The Member States are obliged to provide legal protection against the circumvention of any effective technological measures covering works or any other subject-matter. This legal protection also relates to 'preparatory acts' such as the manufacture, import, distribution, sale or provision of services for works with limited uses. There are also amendments to Directives 92/100 and 93/98 necessary in order to transpose the new international obligations in the field into Community law. Today's patent protection in Europe rests upon a multi-layered system. On the one hand there are national systems of patent protection. Due to international conventions they are quite uniform as regards the conditions for the grant of the patent, but they differ considerably as regards the substantive terms of protection, the procedure and costs of granting protection and the forms, costs and rigour of enforcement (Ullrich 2002, 435–6). On the other hand there is a European Patent System established in 1973 by the European Patent Convention (EPC). European patents are granted by the European Patent Office (EPO) by a centralised procedure with uniform conditions. It allows applicants to obtain, by one application and through one procedure, independent national patents for as many Member states they designate among the currently 28 states that are members to the EPC. But once granted, the patents become national and subject to the divergent national laws of EPO Member States. This is of course contrary to the Community goal to create its own intellectual property system and within it a unitary Community patent.

None of the existing systems are based on a Community legal in-

strument, thus a specific Community patent convention was drawn up among the original six members of the Community. For political reasons, the Community Patent Convention (Convention for the European Patent for the Common Market, OJ L 401/1) has been signed as late as 1975 in Luxembourg by the then nine Member States and amended in 1985 and 1989 (Paterson 1992, 17). However it has never been ratified by all member states and at the end it turned out to be 'a major failure of unification of industrial law and policy' (Ullrich 2002, 438). Although the Convention never came into force, its importance is in the significant impact on further unification of patent law in the Community.

Technical inventions can be protected not only by patents, but also by utility models, which also afford exclusive protection, although they provide less legal certainty than patents can and, for that reason, can be obtained more cheaply and quickly. To harmonise the legislation of the member states as regards the utility models at Community level, the Commission proposed a Directive approximating the legal arrangements for the protection of inventions by the utility model. The Commission has also put forward the proposal for a Directive on the patentability of computer-implemented inventions, to harmonise and clarify national patent law in this field. As regards biotechnology, Directive 98/44 on the legal protection of biotechnological inventions has been adopted, with a principal objective to clarify the distinction between what is patentable and what is not. Discoveries, the human body at the various stages of its formation and development and processes for cloning human beings and for modifying the germ-line genetic identity of human beings may not be regarded as patentable inventions.

UNIFICATION OF INTELLECTUAL PROPERTY LAW IN EUROPE

Through an ever-widening harmonisation of copyright law, trademark law and design law, the Common market has been slowly developing towards a true internal market of intellectual property protection. Although much progress has been made, directives do not provide an adequate basis for completing the single market. In addition to this, the Community intellectual property system cannot be established merely by harmonisation of national legislations. Moreover we have to consider, that the trend since Maastricht has been to minimize harmonisation, representing a step back in the field of intellectual property law and starting to create problems. Where harmonisation is minimal, member states are free to enact more strict domestic standards, which are likely to create

barriers to the single market. Even where harmonisation is full, the attainment of an internal market without frontiers is not possible without a substantial unification of national laws, which can be achieved through regulations.

Regulations are concerned with the unification of law, as they create new rights 'superimposed' on national rights (Tritton 2002, 31). Article 95 EC Treaty does not provide the legislative basis for actions that go beyond harmonisation. Instead such regulations must be enacted in accordance with Article 308 EC Treaty (ex article 235), which states: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market ... and this Treaty has not provided the necessary powers, the Council shall, acting unanimously [...] take the appropriate measures.'

On the legal basis of Article 308 EC Treaty, Council Regulation 40/90 on the Community Trademark was adopted in 1993. The regulation on the Community trademark enables a holder of a community trademark to market his product within the Community territory and to benefit from a single set of rules of protection. It provides for a single filling for a registration covering the whole Community territory. It operates alongside Member States' national trademark registration systems. The substantive provisions are almost the same as in the trademark harmonisation directive. A Community trademark is created through registration at the Office for Harmonisation in the Internal Market (OHIM). A Community trademark may consist of any signs capable of being represented graphically (particularly words, designs, letters, numerals, shape of goods or of their packaging) provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings. The duration of the Community trademark is 10 years and it is renewable for a further period of 10 years. The regulation has been supplemented by an implementing regulation setting the fees payable to the OHIM (Regulation 2869/95) and a regulation establishing the procedure to be followed (Regulation 216/96). Regulation 2868/95 has been adopted to implement the TRIPS Agreement concluded in the framework of the Uruguay Round in the years 1986–1994. Directive 98/71/EC sought to approximate the legislation of the Member States on designs. It did not, however, aim to create a Community design, given that it was still necessary to register the design in the Member States of the European Community. The Community design was introduced with the Regulation 6/2002. The regulation provides for a right, which is valid

throughout the Community. In this respect it is similar to community trademark. The substantive conditions are the same as that in the design directive. The Community design is capable of protection for 25 years and is administered by OHIM. A lesser unregistered Community design has a maximum term of three years.[9] This Community system coexists with the national protection systems. Any issues not falling within the scope of the Regulation are covered by the national law of the Member State, including its private international law. Regulation 2245/2002 was adopted to supplement the legal framework of the Regulation 6/2002. The implementation of Regulation 2246/2002 lays down the amounts and rules for payment of the fees to the OHIM. Basic changes were also introduced in other fields of intellectual property protection. In 1992 Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs was adopted and in 1994 the Community adopted Regulation 2100/94 on Community plant variety rights. The debate on the Community patent was reviewed in 1997, when the Green Paper on the Patent System in Europe has been published. In August 2000, a Proposal for a Council Regulation on the Community Patent was introduced and the idea of a convention has been given up. The Community patent system would have the advantage of granting patents with a unitary nature. Unlike the European patent, the Community patent could be granted, transferred, revoked or allowed to lapse only in respect of the whole Union. The conditions for granting the Community patent are set out by the European Patent Convention that would be supplemented by the Community Patent Regulation. The application would be made to the EPO, which would examine the application, publish it and grant a patent. The Regulation also provides for a centralised court which would have exclusive jurisdiction, including litigation, relating to the infringement and the validity of the Community patent. The EU Council meeting on 11 March 2004 failed to reach an agreement on the proposed Community patent. This was not a surprise, as reaching a compromise on this issue is politically extremely difficult. There seemed to be two major difficulties, namely the cost of translating patents and the judicial system. The need to translate the entire patent specification into all the languages of the Member States would be extremely expensive. But the major reason for the failure to adopt the proposed Regulation is the centralisation of litigation and the establishment of a Common Patent Appeals Court. At the moment, whether and on what terms a Community patent will be introduced is still an open ques-

tion. An alternative to the introduction of the Community patent might be the recourse to the European patent Convention, which in articles 142–149 allows forming a special union, where a granted European patent has a unitary character.[10] To begin, only few states would have to sign the mentioned agreement and form a small patent union. In this way, a kind of a mini-Community patent system would be created for the participating Member States. If that proved successful, more and more states would join in and in this way this mini-patent could evolve into a real Community patent (Willems 2002, 569). In addition to this, such a solution does not clash with the existing proposal for a Community Patent Regulation. And finally, such a patent could be a forerunner of a new form of Community assisted, supra-Community integration, which we are likely to see in the future in other areas (Ullrich 2002, 491).

CONCLUSION

The Knowledge-Society core source of wealth is the recognition of intellectual property. The presence of strong intellectual property rights spurs innovation leading to higher economic growth and increasing benefits for all. The purpose of intellectual property is to give protection against competition and is therefore a tool for granting monopoly to authors of products, protected by intellectual property rights. In the past, those rights have played a major role in preventing the free movement of goods within the European Community. This was the prime reason for a Community's legislative activity in this field.

With a view to establish a single market, the European Community has taken action in the intellectual property field mainly to harmonise the existing national laws. Latter on the Community has also created unitary rights at the Community level, valid throughout the EC. Today most intellectual property laws are harmonised or unified within the Community, with the exception of patent law, where the unification is still lacking. In recent years serious efforts have been made to adopt the Community patent system, providing for a single patent for the entire Community. As the creation of a unitary patent has to be put in a fridge for at least some years (author's opinion), the users of the present European patent system will have to be satisfied with it, despite its many imperfections. However there is still a way out of the present cul-de-sac, using the arts. 142–149 EPC and forming a kind of a legal quilt. In this way, a Community patent would be created and the IPR system in the EU would be unified.

NOTES

1 The term intellectual property rights (also IPR's) describes various rights that afford protection to innovative and creative endeavour. The main rights that fall within intellectual property include patents, trade marks, design rights, copyrights and neighbouring rights, breach of confidence, protection against unfair competition (Wilson 2002, 1).
2 In 2003, the Berne Union comprised 150 states.
3 In 2003 the Paris Convetion had 164 contracting states.
4 Almost all states are WTO members and therefore must comply with TRIPS in accordance with its timetables.
5 The most ardent advocates of harmonisation have been the developed countries, both at a regional/supranational and global level.
6 This exception does not apply where the prohibitions or restrictions constitute a mean of arbitrary discrimination or a disguised restriction or trade between member states. See art 30 EC Treaty.
7 C 9/93 IHT Internationale Heiztechnik GMBH v Ideal-Standard GMBH, ECR I-2789, [1994] 3 CMLR 857.
8 Both Treaties aim to update international protection of copyright and related rights in the Internet age by supplementing the provisions of the Bern Convention to adapt them to the digital environment.
9 The significant difference in the degree of protection conferred is that a registered design is protected against both systematic copying and the independent development of a similar design, whereas an unregistered design is protected only against systematic copying. A registered design thus benefits from more formal and more comprehensive legal certainty.
10 Article 142 EPC reads: 'Any group of contracting states, which has provided by special agreement that a European patent granted for those states has a unitary character throughout their territory, may provide that a European patent may only be granted jointly in respect of all those states.'

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